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SUPREME COURT, U.S.

No. 97-1121

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

CITY OF CHICAGO,
Petitioner,

v.

JESUS MORALES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVES HENRY HYDE AND LUIS V. GUTIERREZ, ALLIED EDUCATIONAL FOUNDATION, NORTHWEST NEIGHBORHOOD FEDERATION, AND WEST AVALON CIVIC GROUP, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: June 19, 1998

Counsel for *Amici Curiae*

27 pp

QUESTION PRESENTED

Amici curiae address the following question only:

Whether, despite legislative findings about the deleterious effects of loitering by criminal street gangs, an ordinance that requires a group of loiterers containing criminal street gang members to obey a police order to move on violates substantive due process guarantees.

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INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation in a wide variety of areas, WLF devotes a substantial portion of its resources to criminal justice reform and crime prevention efforts. To that end, WLF has appeared before this Court as well as other federal and state courts to support government efforts to ensure that law-abiding citizens can

feel safe while walking down neighborhood streets. *See, e.g., People ex rel. Gallo v. Acuna,* 14 Cal. 4th 1090, *cert. denied,* 117 S. Ct. 2513 (1997); *Northern Virginia Chapter, American Civil Liberties Union v. City of Alexandria,* 747 F. Supp. 324 (E.D. Va. 1990). WLF also filed briefs in this case in support of Petitioner in both the Supreme Court of Illinois and the Appellate Court of Illinois.[1]

Reps. Henry J. Hyde and Luis V. Gutierrez are Members of the U.S. House of Representatives, representing Illinois's 6th and 4th Districts, respectively. Rep. Hyde is Chairman of the House Judiciary Committee. Reps. Hyde and Gutierrez support the City of Chicago's efforts to control escalating gang-related problems through passage of its gang loitering ordinance.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The Northwest Neighborhood Federation (NNF) is a coalition of community groups located on Chicago's northwest side. The NNF coalition includes the following groups: Belmont-Irving Organization; Kelvyn-Wel Community Organization; Avondale Community Team;

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief, in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

Cragin Community Association; Belmont Austin Concerned Neighbors; West Cragin Neighbors; Hanson-Riis Park Neighborhood Association; and North Avondale Organization. The NNF has received petitions from over 10,000 residents of the northwest side of Chicago who are in favor of taking action to curb criminal street gang activity in their neighborhoods.

The West Avalon Civic Group is a non-profit community association founded in 1972. It is 95% comprised of senior citizens residing in an area of Chicago bounded by 79th Street, 87th Street, Cottage Grove Avenue, and Dobson Avenue.

Amici's constituents and/or members include many individuals who are adversely affected by the gang loitering activities giving rise to the challenged ordinance. *Amici* believe that while the ordinance was being enforced, it significantly improved the quality of life for large numbers of Chicago residents, by demonstrating to them that the City was unwilling to cede control of public streets to criminal gangs.

While *amici* believe that the Ordinance is sufficiently clear in defining proscribed conduct to withstand a void-for-vagueness challenge, *amici* do not address that issue. Rather, this brief focuses on the substantive due process issue; *amici* believe that nothing in the Ordinance so offends liberty interests deeply rooted in our nation's history as to permit a finding that the ordinance violates substantive due process rights.

Amici submit this brief in support of Petitioner with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby incorporate by reference the Statement contained in Petitioner's brief.

In brief, the Chicago City Council on June 17, 1992 adopted an ordinance (the "Ordinance") authorizing police officers to order any group of persons to disburse if the officer reasonably believed that the group contained a member of a criminal street gang. *See* Municipal Code of Chicago, Illinois § 8-4-015 (1992); Petition Appendix ("Pet. App.") 60a-63a. Failure to obey such an order is a criminal offense, punishable by a fine of up to $500 or imprisonment up to six months or both. *Id.* at 63a.

The Ordinance was adopted following hearings on May 15 and 18, 1992, before the Committee on Police and Fire of the City Council of Chicago. Numerous Chicago citizens testified at those hearings that the quality of life in their neighborhoods had deteriorated significantly as a result of increased street gang activity. In particular, citizens testified that gang members, in an effort to claim neighborhoods as their turf, loiter on the streets in those neighborhoods at all hours of the day and night while conducting their illegal gang activities. The record before the City Council showed that results of such loitering are the intimidation of law-abiding passers-by, the solicitation of local children to enlist as gang members, the sale of drugs, the confinement of frightened residents to their homes, the disruption of local businesses, and frequent instances of violence.

A frequently expressed complaint was that neighborhood residents felt that both they and the police

were powerless to "take back" their neighborhoods from these gangs. As Laura Cella, a member of *amicus curiae* NNF, explained to the City Council in describing the activities of the Latin Kings street gang:

> On any given night 30 or 40 gang members hung out at the intersection blocking traffic, throwing gang signs, intimidating residents and, in general, just disrupting life in the entire community. Once the gang established the street as their own, they were free to conduct business openly and without fear of the law. . . . [P]olice never saw it because the gang members have their own scanners. The police would show up. They would see a group of hoods hanging out, but they weren't showing signs, blocking traffic, or selling drugs. Drugs were hidden. They hid everything and stopped their blatant gang activity, and the police would have to leave because there was absolutely nothing they could do.

Tr. of May 15, 1992 hearing, Supp. Record I at 50-51.

Another resident expressed similar sentiments of helplessness in the face of gang intimidation:

> I fought in the Vietnam War. I was a fireman. I was an auxiliary policeman. I have never had the terror that I feel every day when I walk down the streets of Chicago. . . When I call the police, the police come to my house and it points me out. I have had my windows broken out. I have had guns pulled on me. I have been threatened. I get intimidated on a daily basis, and it's come to the point where I say, "Well, do I go out today?

Id. at 124-125. Those who testified were virtually unanimous that a gang loitering ordinance could be decisive in enhancing the liveability of their neighborhoods. *See, e.g., id.* at 56, 64, 80, 111, 117, 125, 138-139.

The Ordinance was adopted in response to these citizen concerns. The City Council specifically found that "[o]ne of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas" and that "loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity." Pet. App. 60a. The Council determined that adoption of the Ordinance was "necessary to preserve the City's streets and other public places so that the public may use such places without fear." *Id.* at 61a.

The Ordinance provides:

> Whenever a police officer observes a person who he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Municipal Code of Chicago, § 8-4-015(a); Pet. App. 61a.

The Ordinance creates an "affirmative defense" for those who can demonstrate that "no person who was observed loitering was in fact a member of a criminal street gang" (§ 8-4-015(b); Pet. App. 61a), and defines in detail

each of the terms used in § 8-4-015(a). Pet. App 61a-63a. The Chicago Police Department later released Police Department General Order 92-4, which provided even more guidance to officers regarding the circumstances under which the Ordinance should be invoked.

Chicago police subsequently made arrests under the Ordinance on numerous occasions. Trials in the Circuit Court reached conflicting results regarding the constitutionality of the Ordinance. On December 18, 1995, the Appellate Court of Illinois -- in the initial test of the Ordinance to reach an appellate court -- ruled that the Ordinance violated both the United States and Illinois Constitutions. Pet. App. 20a-36a. The appeals court held that the Ordinance violated constitutionally protected "freedoms of association, assembly and expression," was "unconstitutionally vague," "unconstitutionally criminalizes status," and allowed arrests without probable cause in violation of the Fourth Amendment. *Id.* at 21a. Later Ordinance cases to reach the appeals court were similarly dismissed, on the strength of the initial December 1995 decision. *Id.* at 37a-40a.

The Supreme Court of Illinois agreed to hear appeals from each of the appeals court dismissals. On October 17, 1997, the Supreme Court affirmed. *Id.* at 1a-19a. The court cited two grounds for striking down the Ordinance. First, the court held that the Ordinance was void for vagueness, both because it failed to provide adequate notice of proscribed conduct and because it failed to "discourage arbitrary or discriminatory enforcement." *Id.* at 6a-17a. Second, the Court held that the Ordinance violates "substantive due process" because it is "an arbitrary restriction on personal liberty." *Id.* at 17a-19a.

The Court granted Petitioner's petition for review on April 20, 1998. The petition raises two separate issues -- whether the Ordinance is void for vagueness under the Due Process Clause of the 14th Amendment, and whether the Ordinance violates rights/liberties substantively protected by the Due Process Clause. This brief addresses only the second of those two issues.

SUMMARY OF ARGUMENT

The Due Process Clause protects a limited number of "liberty" interests thought to be so fundamental that the government may not deprive individuals of those interests regardless of the fairness of the process employed by the government. But this Court has been very reluctant to expand this concept of substantive due process because there are so few "guideposts" that can assist the Court in making those types of considerations. Accordingly, the Court has limited recognition of substantive due process rights to those areas which "are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksburg,* 117 S. Ct. 2258, 2267-2268 (1997).

Under that standard, the right to loiter claimed by Respondents is not entitled to substantive due process protection. Anti-loitering statutes have been enforced throughout England and America for the past 600 years. Moreover, the primary motivation for such laws has been crime prevention, precisely the motivation behind Chicago's Ordinance. While certain aspects of older vagrancy statutes (particularly provisions restricting citizens' right to travel) are no longer considered constitutionally acceptable, this Court has never questioned the right of government to use such statutes to fight crime.

When (as here) a challenged state action does not implicate any fundamental rights, the action passes muster under the Due Process Clause so long as it bears a reasonable relation to a legitimate state interest. The Ordinance easily meets that test.

ARGUMENT

I. LOITERING IS NOT ONE OF THE LIBERTY INTERESTS SPECIALLY PROTECTED BY THE DUE PROCESS CLAUSE

A. An Activity Is Not Entitled to Special Protection Under the Due Process Clause Unless Such Protection Is Deeply Rooted in the Nation's History and Tradition

The primary focus of the Due Process Clause of the 14th Amendment is procedural fairness; a fair process must be employed before our government may deprive anyone of life, liberty, or property. It is nonetheless now well settled that the Due Process Clause has a substantive component as well; certain "liberty" interests are thought to be so fundamental that the government may not deprive individuals of those interests regardless of the fairness of the process employed by the government. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923)(the right to direct the education and upbringing of one's children).

In striking down the Ordinance, the Illinois Supreme Court invoked this substantive aspect of due process. The court held that "the acts of loafing, loitering, and nightwalking" are "amenities of American life," and that "[t]he freedom to engage in such harmless activities is an aspect of the personal liberties protected by the due process

clause." Pet. App. 17a. The sole U.S. Supreme Court decision cited by the court in support of its conclusion was *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).

The Illinois court's reliance on *Papachristou* was misplaced. The Court in that case struck down a Jacksonville, Florida vagrancy ordinance on void-for-vagueness grounds. *Id.* at 162. While the Court in *dictum* went on to discuss in general terms the propriety of vagrancy laws, that discussion played no part in the Court's holding. *Id.* at 163-164. In particular, *Papachristou* contains no discussion regarding how one goes about determining the scope of the Due Process Clause's substantive protections.

Subsequent Court decisions have provided detailed guidance regarding when an activity is entitled to substantive due process protection. The contours of substantive due process are to be drawn "from careful 'respect for the teachings of history [and], solid recognition of the basic values that underlie our society.'" *Moore v. City of East Cleveland,* 431 U.S. 494, 503 (1977)(plurality opinion) (quoting *Griswold v. Connecticut,* 381 U.S. 479, 501 (Harlan, J., concurring)). Substantive due process "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg,* 117 S. Ct. 2258, 2268 (1997)(quoting *Moore,* 431 U.S. at 503 (plurality opinion)). Thus, the Court in *Moore* stated that "the sanctity of the family" is entitled to substantive due process protection:

> precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Id. at 503-504 (plurality opinion).

The Court has held that the "liberty" interests specially protected under the Due Process Clause include -- in addition to the specific freedoms protected by the Bill of Rights -- such rights as the right to marry (*Loving v. Virginia,* 388 U.S. [illegible]67)), the right to use contraceptives (*Griswold*), and the right to an abortion (*Planned Parenthood v. Casey,* 505 U.S. 833 (1992)).

But the Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992). The Court has explained that reluctance as follows:

> By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court, *Moore,* 431 U.S., at 502 (plurality opinion).

Glucksberg, 117 U.S. at 2267-2268. Limiting the recognition of substantive due process rights to those areas which "are, objectively, deeply rooted in this Nation's history and tradition" serves to provide "crucial guideposts for

responsible decisionmaking" that "direct and restrain [the Court's] exposition of the Due Process Clause." *Id.* at 2268.

The Illinois Supreme Court failed to undertake such a historical analysis before determining that "the acts of loafing, loitering, and nightwalking" are "an aspect of the personal liberties protected by the due process clause." Pet. App. 17a. Historical analysis reveals that anti-loitering laws such as the Ordinance have long been accepted under English and American tradition, and that loitering -- defined here as "remain[ing] in any one place for no apparent purpose" -- has never been accepted in this country as a fundamental right or liberty interest.

B. The Alleged "Right to Loiter" Is Not a Right So Rooted in the American Experience As to Be Deemed a Fundamental Right

Vagrancy and anti-loitering statutes have been a fixture of Anglo-American law since at least the Fourteenth Century. Commentators have, from time-to-time, ascribed economic motives to vagrancy laws (a broader category, of which anti-loitering laws are a subset). For example, the Statutes of Labourers of 1349-1350, which attempted to restrict the free movement along public ways of laborers seeking employment, have been characterized by some as an effort to hold down wages in an era of labor shortage following the Black Death. *See, e.g.*, William J. Chambliss, *A Sociological Analysis of the Law of Vagrancy,* 12 SOCIAL PROBLEMS 67, 69 (1964) [hereinafter, "Chambliss"]. Similarly, vagrancy laws were utilized in Elizabethan England to restrict movement of paupers who, it was feared, might be a drain on the resources of local communities that had begun organized relief efforts on

behalf of local poor people. *See, e.g.*, Mark Malone, *Homelessness in a Modern Urban Setting,* 10 FORDHAM URBAN L.J. 749, 755-756 n.19 (1982) [hereinafter "Malone"].

However, historians are in general agreement that vagrancy and anti-loitering laws have over the centuries been motivated primarily by a desire to control crime. Malone, *supra,* 758-759; Jeffrey S. Adler, *A Historical Analysis of The Law of Vagrancy,* 27 CRIMINOLOGY 209, 212 (1989). The Court in *Papachristou* emphasized the crime-prevention purpose underlying the creation of vagrancy and anti-loitering laws. *Papachristou,* 405 U.S. at 161 n.4 ("the notorious 'brotherhood of beggars' which flourished in the 16th and 17th centuries . . . were a definite and serious menace to the community and it was chiefly against them and their kind that the harsher provisions of the vagrancy laws of the period were directed").

English vagrancy laws were reproduced in colonial America as crime-prevention measures. Chambliss, *supra,* at 75-77; Malone, *supra,* at 755-756. Able-bodied individuals who spent their time idly were (not surprisingly) considered the most likely suspects for crimes that were disrupting the community; vagrancy and anti-loitering laws were used to reduce the level of disruptive activity. *Id.* at 758-59.

Amici do not understand Respondents to seriously challenge the proposition that anti-loitering laws have been in widespread use throughout our nation's history. Rather, their argument appears to be that times have changed, and that what were once accepted as permissible crime-

prevention measures are no longer permissible in a "modern" society.

But any such argument is contrary to established case law regarding recognition of substantive due process rights. "The acts of loafing, loitering, and nightwalking" (Pet. App. 17a) can hardly be said to be fundamental rights "deeply rooted in this Nation's history" (*Glucksburg*, 117 S. Ct. at 2268), given that they have been subject to significant abridgement throughout American history, up to and including the present day.[2] Recent lower-court decisions that have struck down anti-loitering ordinances on substantive due process grounds generally have done so by reference to *dictum* in *Papachristou* rather than based on any claim that loitering has traditionally been deemed a fundamental right in this country.

Amici do not mean to suggest that all aspects of medieval vagrancy law conform to the American understanding of ordered liberty. Indeed, even as many states maintained on their statute books broad vagrancy

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[2] State anti-loitering statutes currently in force include the following: ALA. CODE § 13A-11-9 (1975); ARIZ. REV. STAT. ANN. § 13-2905 (1988); ARK. CODE ANN. § 5-71-213 (Michie 1995); CAL. HEALTH & SAFETY CODE § 11532 (West 1995); COLO. REV. STAT. ANN. § 18-9-112 (West 1997); DEL. CODE ANN. tit. 11, § 1321 (1998); FLA. STAT. ANN. § 856.021 (West 1997); GA. CODE ANN. § 16-11-36 (1980); HAW. REV. STAT. S 712-1206 (1991); KY. REV. STAT. ANN. § 525.090 (Michie/Bobbs Merrill 1994); LA. REV. STAT. ANN. § 14:107 (West 1968); MINN. STAT. ANN. § 609.725 (West 1986); N.H. REV. STAT. ANN. § 644:6 (1996); N.Y. PENAL LAW § 240.35 (McKinney 1979). Many cities, towns, and counties enforce similar anti-loitering ordinances.

laws that sought to restrict the right of paupers to travel freely, the nation developed a strong tradition of permitting unrestricted travel among the several states. As Justice Cardozo once noted:

> The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed under the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

Baldwin v. Seelig, 294 U.S. 511 (1934). This Court had recognized by the mid-19th Century that "the right to move freely from state to state was a right of *national* citizenship." *Edwards v. California*, 314 U.S. 160, 179 (1941)(Douglas, J. concurring)(emphasis in original); *see also id.* at 184 (Jackson, J., concurring).

These competing strands of American tradition co-existed uneasily. The desire of states to avoid the financial burden of caring for paupers led to the exclusion of "paupers" and "vagabonds" from the Privileges and Immunities Clause contained in the Articles of Confederation. This Court on several occasions affirmed the right of states to exclude paupers from their midst, most famously in *City of New York v. Miln*, 36 U.S. (11 Pet.) 102, 142-143 (1837)(it is "as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence."). On the other hand, the Court held that the "fundamental" right of citizens to travel freely throughout the nation was violated by a Nevada tax imposed on those

leaving the state by common carrier. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

The Court ultimately resolved this tension in *Edwards* by explicitly extending to all citizens the right to travel freely, without regard to wealth. *Edwards*, 314 U.S. at 177 (invoking Commerce Clause to invalidate California law prohibiting the bringing of indigents into the state). The Court concluded that California lacked a rational basis for excluding indigents because "[p]overty and immorality are not synonymous," and because "the relief of the needy has become the common responsibility and concern of the whole nation." *Id.* at 177, 175.

The Court recognized the lengthy tradition in English and American history which held "that each community should care for its own indigent, that relief is solely the responsibility of local government." *Id.* at 174. The Court concluded, however, that times had changed and that the tradition of local relief efforts had been supplanted by federal and state assumption of those tasks. *Id.* at 174-175. Because "the theory of the Elizabethan poor laws [i.e., that relief is solely the responsibility of local government] no longer fits the facts," that theory could not be invoked to justify imposing travel restrictions on indigents. *Id.* *See also, Shapiro v. Thompson*, 394 U.S. 618 (1968)(the right to travel is a right protected by the Due Process Clause, and states violate that right by denying welfare benefits to indigents newly arrived from other states).

In sum, it is now well settled that substantive due process protects the right of all citizens to move freely within the country, notwithstanding past efforts to use the vagrancy laws to restrict the movement of indigents. It should be noted, however, that those aspects of vagrancy

laws no longer deemed constitutionally acceptable had an *economic* rationale (e.g., the desire of a community to avoid increased welfare payments by excluding paupers). The Court has never invoked substantive due process to invalidate those aspects of vagrancy and anti-loitering laws whose primary rationale is to reduce crime. Moreover, it is not accurate to view anti-loitering laws such as the Ordinance as imposing any restrictions on the movement of citizens; the purpose of such laws is quite the opposite -- to prevent individuals from "remain[ing] in one place with no apparent purpose" (Pet. App. 61a) under circumstances suggesting that undesirable activity is taking place.

In support of its decision to expand substantive due process protections to "the acts of loafing, loitering, and nightwalking," the Illinois Supreme Court stated that such activities are "harmless." Pet. App. 17a. *Amici* respectfully submit that that is the type of judgment that no court should be attempting to make. The City of Chicago and many of its citizens have determined that loitering on city streets under the circumstances described in the Ordinance is extremely harmful to the quality of life in the city. In the absence of evidence that the "right" to loiter is a right "deeply rooted in this Nation's history and tradition," the courts are ill-equipped to overrule the democratically elected branches of government on this point.

Papachristou makes the valid point that most people who loiter or engage in nightwalking do not get arrested for doing so. The Court said, "The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent." *Papachristou*, 405 U.S. at 163. But that statement was written in connection with the Court's consideration of a void-for-vagueness challenge to

Jacksonville's vagrancy statute. A statute is void for vagueness if, *inter alia,* it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" (*id.* at 162); fair notice is of particular concern when a statute criminalizes activities that the average citizen might consider to be "innocent" behavior. But the Court's reference to "normally innocent" activities should not be read as prohibiting governments from determining that such activities under some circumstances can undermine public order and thus should be criminalized.[3]

Although *Papachristou* was decided on void-for-vagueness grounds, *dictum* in the opinion suggests that the Jacksonville vagrancy ordinance at issue there also violated substantive due process rights. The Court said:

> The difficulty is that these activities [prohibited under the ordinance, including wandering, strolling, loitering, and loafing] are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-

[3] Moreover, absence of "fair warning" is not a legitimate concern under the Ordinance, because no one can be arrested pursuant to the Ordinance unless he disobeys an order to disperse. Ordinance, § 8-4-015(a). Indeed, in *Shuttlesworth v. City of Birmingham,* 382 U.S. 87 (1965), the Court stated in *dictum* that an anti-loitering ordinance was *not* facially void for vagueness where it provided for arrest of those who obstructed the free passage of streets or sidewalks *and* refused to obey a police order to move on. *Shuttlesworth,* 382 U.S. at 91.

> confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encourage lives of high spirits rather than hushed, suffocating silence.

Id. at 164.

Were the Court to extend substantive due process protection to all the "unwritten amenities" of life cited in *Papachristou,* that doctrine would expand far beyond the "guideposts for responsible decisionmaking" referenced in *Collins* and *Glucksburg*. Moreover, while many people would concede that "loitering" quietly by oneself in front of one's own house constitutes "innocent" behavior, most would challenge that description if one loiters with a criminal street gang in a manner that intimidates passers-by. Given the infinite variety of circumstances under which one might experience the amenities of life described in *Papachristou,* courts should not place themselves in the position of second-guessing legislative determinations that some of those circumstances should not be deemed "innocent."

Amici note finally that the passage from *Papachristou* quoted above makes reference to "the right of dissent" and other expressive activities. Such expressive activities are, of course, often entitled to First Amendment protection. But there is nothing expressive about the activities made criminal under the Ordinance: "loitering" is the only activity prohibited under the Ordinance, and it can hardly be considered an "expressive" activity given that it is defined as "remain[ing] in any one place with no apparent purpose." Ordinance, § 8-4-015(a). Nor can the

Ordinance be said to interfere with the First Amendment right to associate with others. The Court has made clear that the First Amendment right to associate extends only to associations with a substantial expressive purpose; a mere desire to meet and talk with friends is insufficient. *City of Dallas v. Stanglin,* 490 U.S. 19 (1990).

II. THE ORDINANCE IS REASONABLY RELATED TO A LEGITIMATE STATE INTEREST

When (as here) a challenged state action does not implicate any fundamental rights, the action passes muster under the Due Process Clause so long as it bears "a reasonable relation to a legitimate state interest." *Glucksburg,* 117 S. Ct. 2268. The Ordinance easily meets that test.

Prior to adopting the ordinance, the Chicago City Council had before it considerable evidence that life in many city neighborhoods had deteriorated significantly as a result of increased street gang activity. In particular, by loitering on neighborhood streets at all hours of the day and night while conducting illegal gang activities, gang members were intimidating law-abiding passers-by, disrupting local businesses, and effectively confining frightened residents to their homes.

The Ordinance was adopted for the purpose of addressing those concerns. By preventing gang members from loitering on city streets, Chicago can make its streets accessible once again to law-abiding citizens and can decrease the opportunity for gang members to engage in illegal activities. Numerous citizens have attested to the effectiveness of the Ordinance while it was being enforced. But even if the Ordinance had not proven effective, there

was at least a reasonable basis for believing that it might -- and thus the Ordinance bears a reasonable relation to Chicago's goal of improving the city's quality of life.

Dictum in *Papachristou* suggests that vagrancy and anti-loitering laws are illegitimate because their real purpose is to incarcerate those suspected of having committed, or of being likely to commit a crime -- but against whom the police have insufficient evidence to obtain a conviction. *Papachristou,* 405 U.S. at 169-171. But the Court in *Papachristou* seemed most concerned by the danger that vagrancy laws were being enforced in a discriminatory manner against the poor and racial minorities. *Id.* Assuming that the provisions of a loitering statute are sufficiently clear to channel police officers' discretion regarding against whom to bring charges, vagueness problems are eliminated and the dangers of discriminatory enforcement are reduced. Nor should the Ordinance be viewed as a back-handed way of incarcerating gang members whom police believe (but cannot prove) committed other crimes. Chicago has a reasonable basis for concluding that it is the gang-member loitering itself (not simply the unproven crimes) that is causing the deterioration of neighborhoods; that conclusion is sufficient justification for Chicago's decision to criminalize loitering in limited circumstances.

CONCLUSION

Amici curiae Washington Legal Foundation, *et al.*, respectfully request that the judgment of the Supreme Court of Illinois be reversed.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

Counsel for *amici curiae*

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